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JANUARY 6, 2025 BY RONNIE

Federal Proposed Class Action (Injection Mandates) Survives: Is s.2(d) The Way Forward?

ORDER IN T-2142-23

THIS COURT'S ORDER is that:

1. This motion is granted in part, and the portion of the Claim related to the Plaintiffs' assertion of the tort of misfeasance in public office is struck.

2. In connection with the Claim's assertion of the tort of misfeasance in public office, the Plaintiffs are granted leave to amend the Claim to identify additional proposed representative plaintiff(s), and to plead material facts in relation to claims by such plaintiffs, who are not afforded grievance rights by the *FPSLRA*.

3. This motion is otherwise dismissed.

4. No costs are awarded on this motion.

"Richard F. Southcott"
Judge

2025 FC 5 (CanLII)

With all of the horrible cases that have been covered, it's rare (but refreshing) to see one that's actually well put together. Last week, Federal Court Judge Southcott dismissed (most) of a Motion to Strike, allowing the case to proceed.

A Proposed Class Action for Federal workers was filed in October 2023 by B.C. lawyer Umar Sheikh. It was on behalf of 3 Representative Plaintiffs who were forced out of their positions. They had been employed by:

- Department of National Defence (Payne)
- Correctional Services Canada (Harvey)
- Federal Economic Development Agency for Southern Ontario (Molaro)

Many of the cases involving injection passports filed in recent years were sloppy, and didn't properly plead any tort or Charter violations. One of the most infamous was the "bad beyond argument" Adelberg case, and Appeal. Interestingly though, since Adelberg didn't *quite* result in all claims being thrown out for good, it served as leverage for this case.

But what Sheikh and Wood did was quite different. They argued just 2 torts, and at least one of them never tried in a serious way in these cases.

- Section 2(d) of the Charter: Freedom of Association
- Malfeasance of Public Office

The Malfeasance of Public Office tort was struck regarding the 3 Plaintiffs here. The reason being that all 3 apparently had some right to grieve under the Federal Public Sector Labour Relations Act. But the Judge did allow for the possibility of new Plaintiffs — it is a Class Action — whom might qualify.

As for the Section 2(d) allegations: they are allowed to proceed.

Sections 208/236 FPSLRA Typically Bar Workers From Court

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Constitutional Documents
Canadian Charter of Rights and Freedoms
Consolidation of Constitution Acts, 1867 to 1982
Consolidation of Constitution Acts, 1867 to 1982 (1990 Report version)
French Constitutional Drafting
Federal Public Sector Labour Relations Act (S.C. 2003, c. 22, s. 2)
Full Document: HTML (Accessibility Buttons available) | XML [511 KB] | PDF [1086 KB]
Act current to 2022-11-02 and last amended on 2019-07-29. Previous Versions
Notes : • See coming into force provision and notes, where applicable.
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> Right of employee
> 208 (1) Subject to subsections (2) to (7), an ***employee is entitled to present an individual grievance if he or she feels aggrieved***
> (a) by the interpretation or application, in respect of the employee, of
> (i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that ***deals with terms and conditions of employment***, or

(ii) a provision of a collective agreement or an arbitral award; or
(b) as a ***result of any occurrence or matter affecting his or her terms and conditions of employment***.

No Right of Action
Disputes relating to employment
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236 (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is ***in lieu of any right of action that the employee may have*** in relation to any act or omission giving rise to the dispute.

The main obstacle to Government workers suing is the Federal Public Sector Labour Relations Act, or FPSLRA. Section 208 gives everyone the right to grieve, while Section 236 prohibits Actions (or lawsuits). This is similar to unionized private employers, and there are plenty of rulings striking such cases.

But what happened here is rather clever. By using union arguments about meaningful consultation, the Judge was persuaded that there was no valid grievance process, or at least that it was arguable.

Section 2(d) Of Canadian Charter: Freedom Of Association

44.The Plaintiffs' and Class Members plead that s. 2d of the Charter provides for Freedom of association ***which guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, which includes a right to collective bargaining***. As such Laws or state actions ***that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining***, as may laws that ***unilaterally nullify significant negotiated terms in existing collective agreements***.

45. The Plaintiffs and Class Members all had freely negotiated, valid, and binding contractual employment agreements with the Treasury Board.

> 46. ***None of the Plaintiffs or Class Member contractual employment agreements*** called for ***disclosure of Covid-19 vaccination status nor mandatory Covid-19 vaccination***.

> 47. The Plaintiffs' and Class Members plead that the Policy was a new term and condition placed upon their employment by the Treasury Board ***absent collective bargaining, memoranda of agreement, consideration, or consent***.

> 48. The Plaintiffs' and Class Members plead that the imposition by Treasury Board of a new term and condition of employment ***absent collective bargaining, memoranda of agreement, consideration, or consent violates their protected right under s. 2d of the Charter***.

> 49. The Plaintiffs' and Class Members plead that the action of the Treasury Board in ***imposing a new term and condition of employment absent collective bargaining, memoranda of agreement, consideration, or consent*** is not saved by s.1 of the Charter as the Treasury Board did not possesses the requisite justification based upon the objectives espoused by the Policy.

(This is from paragraphs 44 to 49 in the Statement of Claim.)

To understand why the Motion to Strike failed, consider what is actually being argued. No one contests that the terms of employment were changed. Instead, the challenge is brought over *lack of consideration and meaningful consultation*. It's not entirely that injection mandates were introduced into Government employment. It's that there was no proper protocol in implementing it.

Section 2(d) had been mentioned — in passing — in other injection pass cases. But Sheikh and Wood may be the first to actually have used it successfully.

If all of this sounds like a union argument, it is. Sheikh is former counsel for the British Columbia Nurses' Union (BCNU), and for a time, was the C.E.O. This case was written from the perspective of someone who expects employers to deal in good faith with workers.

Of course, this is nowhere near the end. The case still needs certification, and even then, there are many steps before Trial. That said, at least the case is still alive.

What Tipped The Scales For The Plaintiffs?

> [35] In my view, the authority that ***carries the day for the Plaintiffs*** in the context of this motion is the decision of the Supreme Court of Canada [SCC] in Morin. That case considered ***whether a labour arbitrator's exclusive jurisdiction granted by provincial statute applied to an argument that a collective agreement was negotiated in a discriminatory manner, so as to include a discriminatory term***, and thereby contravened the Québec Charter of Human Rights and Freedoms…. The SCC found that the dispute did not concern how the relevant term in the collective agreement would be interpreted and applied ***but rather whether the process leading to the adoption of the alleged discriminatory clause violated the Québec Charter*** such that the term was unenforceable (at paras 23-24).

And that parallels what happened here. It wasn't necessarily bringing in injection mandates themselves, but the way which it was implemented.

On some level, it's an absurd argument, but it got past a Motion to Strike.

Brief Timeline Of Major Events In Case

October 6th, 2023: Statement of Claim is filed on behalf of 3 Representative Plaintiffs.

November 9th, 2023: Government responds with their Notice of Intent.

May 31st, 2024: Government sends notice that it intends to bring Motion to have the case struck (thrown out) in its entirety.

June 6th, 2024: Prothonotary Ring gives directions that there be case management.

June 10th, 2024: Chief Justice Crampton directs (a) Justice Southcott and (b) Prothonotary Ring to be assigned manage the proceeding.

July 1st, 2024: Prothonotary Ring issues schedule for documents to be served for Motion to Strike.

August 19th, 2024: Government brings its Motion to Strike.

October 1st, 2024: Plaintiffs file responding arguments as to why case shouldn't be struck.

December 13th, 2024: Motion to Strike is argued before Justice Southcott.

January 1st, 2025: Justice Southcott *partially* grants the Motion to Strike. The tort of Malfeasance of Public Office is struck, but with Leave if eligible Plaintiffs are identified. The Section 2(d) claims are allowed to proceed.

Section 2(d) Superior To Common 2(a)/7/15 Challenges

Typically, the "freedom lawyers" have cited the standard s.2(a), s.7, and s.15 when it comes to challenging injection requirements. And predictably, they always fail. They never plead the necessary facts, and hence, these claims are routinely tossed.

Other injection passport challenges have included: Section 8 (search and seizure); Section 9 (arbitrary detention); and Section 12 (cruel and unusual punishment). In fairness though, they have been extremely half hearted attempts.

Yes, one could plausibly conclude that the Charter is worthless, since it doesn't protect people outside of narrow grounds. And they're right.

However, plenty of lawyers still take large amounts of money from clients *knowing* that these portions offer no protection whatsoever.

The Section 2(d) method described above may be about the only way around a largely useless and defective Charter. By challenging not the mandates themselves, but *how they were implemented*, there's at least one pathway. Without having meaningful consultations about retroactive changes to their contracts, people are denied their right to freely associate in the context of employment.

The Federal Government may very well try to appeal this decision. After all, it's taxpayer money anyway. But for now, Section 2(d) challenges seem to be realistic method, at least for litigants who don't normally have the right to sue.

Sheikh has a similar case on reserve in B.C., based on the same arguments. We'll have to see how this ruling impacts that one.

(1) Payne Statement Of Claim October 2023
(2) Payne Notice Of Intent To Defend November 2023
(3) Payne Letter Intent To Strike May 2024
(4) Payne Defendant Motion Record To Strike August 2024
(5) Payne Plaintiff Responding Motion Record October 2024
(6) https://www.canlii.org/en/ca/fct/doc/2025/2025fc5/2025fc5.pdf
(7) https://www.canlii.org/en/ca/fct/doc/2025/2025fc5/2025fc5.html

CANADA, CANADIAN DECISIONS, EMPLOYMENT, S.2(D), VACCINES